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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT GADDIE,

Appellant-Plaintiff,

VS.

STATE OF INDIANA,

Appellee-Defendant.

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No. 49A02-0610-PC-898

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable William T. Robinette, Master Commissioner
Cause No. 49G03-0108-PC-174910

October 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Robert Gaddie appeals the denial of his petition for post-conviction relief from his conviction for unlawful possession of a firearm by a serious violent felon (“UPFSVF”).¹ He raises the following restated issues:

- I. Whether Gaddie was denied effective assistance of trial counsel.
- II. Whether Gaddie was denied effective assistance of appellate counsel.
- III. Whether the post-conviction court abused its discretion in denying Gaddie’s request to subpoena several witnesses.

We affirm.

FACTS AND PROCEDURAL HISTORY

The facts set out in Gaddie’s direct appeal are as follows:

On August 28, 2001, Marion County Sheriff’s Deputy Leo George was dispatched to 9136 Cavalier Court, Apartment 33, in Marion County. When he arrived, Beverly Taylor came running from a neighboring apartment and told Deputy George that there were firearms inside Apartment 33. Deputy George requested assistance. When other deputies arrived, they established a perimeter around the apartment building and made telephone contact with the individuals in Apartment 33. Eventually, four persons, including Gaddie and Shari Phillips, exited the apartment. Gaddie lived in the apartment “on and off.” [*Trial*] *Tr.* at 47. Taylor believed that he and Phillips were married. Taylor told at least three deputies that Gaddie had brought firearms to her apartment a day or two before she talked to the police. However, Taylor testified at trial that it was Phillips who brought the firearms to her apartment.

Phillips consented to the search of Apartment 33. Deputy George discovered a loaded rifle and loaded shotgun on the floor under the box spring mattress in the apartment’s only bedroom. Both men’s and women’s clothing hung in the bedroom closet, and ammunition was found on the closet’s shelf. Two tables in the apartment were later identified as Gaddie’s.

Gaddie was arrested. Due to a 1985 conviction for voluntary manslaughter, which qualified Gaddie as a “serious violent felon” under

¹ See IC 35-42-1-1.

[IC] 35-47-4-5, the State charged him with [UPFSVF]. In separate information, the State alleged that Gaddie was a habitual offender for having committed two prior unrelated felonies, a 1980 conviction for attempted robbery and the same 1985 voluntary manslaughter conviction.

At trial, the parties stipulated that Gaddie previously had been convicted of a serious violent felony, and the jury found him guilty of [UPFSVF]. The trial court then determined he was a habitual offender. The court imposed a twenty-year sentence for the handgun conviction, enhanced by ten years for the habitual offender adjudication. This appeal ensued.

Gaddie v. State, No. 49A02-0201-CR-84, slip op. at 2-3 (Ind. Ct. App. Sept. 10, 2002) (footnote omitted).

On direct appeal, Gaddie challenged: 1) whether there was sufficient evidence to prove constructive possession of the firearms; and 2) whether his sentence enhancement was proper. This court found evidence was sufficient to support Gaddie's conviction but held that his previous conviction used to establish his "serious violent offender" status could not also support his sentencing enhancement. Our Supreme Court later denied transfer.

Gaddie filed a Petition for Post-Conviction Relief that he later amended, and the post-conviction court denied. Gaddie now appeals.

DISCUSSION AND DECISION

Post-conviction proceedings are civil proceedings, and a petitioner must establish his claims by a preponderance of the evidence. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002), *cert. denied*, 540 U.S. 830 (2003). Because Gaddie is now appealing from a negative judgment, to the extent his appeal turns on factual issues, he must convince us that the evidence as a whole leads unerringly and unmistakably to a decision opposite that

reached by the post-conviction court. *Id.* Stated differently, Gaddie must persuade this court that there is no way the post-conviction could have reached its decision. *Id.*

Our Supreme Court has stated that post-conviction proceedings do not grant a petitioner a “super-appeal” but are limited to those issues available under the Indiana Post-Conviction Rules. *Timberlake v. State*, 753 N.E.2d 591, 597-98 (Ind. 2001) (citing Ind. Post-Conviction Rule 1(1)).

If an issue was known and available but not raised on direct appeal, it is waived. If it is raised on appeal but decided adversely, it is [*res judicata*]. If not raised on direct appeal, a claim of ineffective assistance of counsel is properly presented in a post-conviction proceeding. A claim of ineffective assistance of appellate counsel is also an appropriate issue for a post-conviction proceeding. As a general rule, however, most freestanding claims of error are not available in a post-conviction proceeding because of the doctrines of waiver and [*res judicata*].

Id. (internal citations omitted).

I. Trial Counsel

In order for Gaddie to establish that he received ineffective assistance of trial counsel he must show that: 1) his trial counsel’s performance fell below an objective standard of reasonableness based on prevailing professional norms; and 2) there is a reasonable probability that the result of the proceeding would have been different had counsel been adequate. *Timberlake*, 753 N.E.2d at 603 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)). The first part of the test requires Gaddie to show that counsel’s errors were so serious that it denied him his Sixth Amendment right under the United States Constitution. *McCorker v. State*, 797 N.E.2d 257, 267 (Ind. 2003). The second part of the test requires Gaddie to show that counsel’s performance resulted in his prejudice. *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002). Before we begin our review,

we start with a strong presumption that counsel's performance was adequate. *Stevens*, 770 N.E.2d at 746.

A. Warrantless Arrest and Detention and Perjured Probable Cause Affidavit

Gaddie claims his trial counsel's failure to challenge his warrantless arrest and the probable cause affidavit, which he claims was supported by perjured testimony, amounted to ineffective assistance of counsel. However, as the State correctly states, Gaddie failed to demonstrate any evidence at the post-conviction hearing to support his contention. Therefore, Gaddie's trial counsel as to the warrantless arrest and detention was not ineffective. *See Tapia v. State*, 753 N.E.2d 581, 587-88 (Ind. 2001) (holding petitioner's failure to present any witnesses or other matters into evidence at post-conviction hearing led to conclusion that petitioner did not meet his burden of proof for post-conviction relief.)

B. Suppression Motion

Gaddie next claims that his trial counsel was ineffective for failing to move to suppress the recovered firearms. At the post-conviction hearing, Gaddie's trial counsel testified that he did not move to suppress the recovered firearms because Phillips, who was the tenant of the apartment, gave verbal and written consent to the search. *Tr.* at 155; *See Polk v. State*, 822 N.E.2d 239, 245 (Ind. Ct. App. 2005), *trans. denied* (consent to search is valid exception to warrant requirement). Gaddie's trial counsel also testified that he did not believe Gaddie had standing to contest the search because, "when [two] people have interest in the same property, one person can consent to a search and that's sufficient for law enforcement to search it and use the fruits of it." *Tr.* at 156. Further,

Gaddie's trial counsel testified that their defense was that Gaddie did not live in the apartment. *Id.* at 155-56.

Gaddie cites *Georgia v. Randolph*, 547 U.S. 103 (2006), which held a warrantless search was unreasonable where the defendant was present and refused to consent. However, Gaddie fails to show any evidence that he refused to consent. Moreover, *Randolph* had not been decided at the time of Gaddie's trial and may not be applied retroactively to demonstrate ineffective assistance of trial counsel for acting under prevailing norms. *See Fulmer v. State*, 523 N.E.2d 754, 757-58 (Ind. 1988) ("Counsel cannot now be found to have been ineffective for failing to object to [matters] that were considered proper at the time of trial."). Gaddie has failed to show that the post-conviction court erred in finding Gaddie's trial counsel was not ineffective.

C. Failure to Present a Defense

Gaddie also claims that his trial counsel's performance was ineffective because he did not subpoena witnesses that Gaddie requested. However, Gaddie failed to present evidence that the testimony of the witnesses would support an exculpatory defense. Although, Gaddie presented the testimony of his mother and his long-time girlfriend, neither testified to any issue relevant at trial. As a result, Gaddie has failed to show prejudice from failure to subpoena the witnesses, and we do not reach the issue of whether trial counsel was deficient for failing to do so. *See Thompson v. State*, 793 N.E.2d 1046, 1051 (Ind. Ct. App. 2003) ("If we may easily dismiss an ineffective assistance claim based upon the prejudice prong, we may do so without addressing whether counsel's performance was deficient.").

D. Failure to Object to Prosecutorial Misconduct

In reviewing a claim of ineffective assistance of trial counsel for failure to object to prosecutorial misconduct, we begin with a presumption that counsel's assistance was effective. *Muex v. State*, 800 N.E.2d 249, 251 (Ind. Ct. App. 2003). Then, we look at whether there was prosecutorial misconduct by determining: (1) whether the State engaged in misconduct regardless of its intent; and (2) whether that misconduct, under all the circumstances, placed the defendant in a position of grave peril to which he should not have been subjected. *Id.* Here, Gaddie claims his trial counsel was ineffective for failing to object to three instances of prosecutorial misconduct.

1. 911 Recording

Gaddie first claims that his trial counsel was ineffective to argue that the State engaged in misconduct by not producing the 911 recording. However, Gaddie again fails to show how the lack of the 911 recording prejudiced him. Accordingly, the trial court did not err in finding Gaddie's trial counsel was not ineffective as to the 911 recording. *See Thompson*, 793 N.E.2d at 1051.

2. Reference to Petitioner as a "Serious Violent Felon"

Gaddie also claims his trial counsel was ineffective for failing to object to the State's references to Gaddie as a "serious violent felon." Prior to the State's opening statement, the parties stipulated that Gaddie had been convicted of a serious violent felony and was a "serious violent felon." The State's three references to Gaddie (during jury introduction, opening statement, and closing statement) as a "serious violent felon" did not constitute prosecutorial misconduct, and defendant failed to show prejudice. *See*

Dugan v. State, 860 N.E.2d 1288, 1292 citing *Spearman v. State*, 744 N.E.2d 545, 546 (Ind. Ct. App. 2001), *trans. denied* (defendant not entitled to bifurcated trial on charge of UPFSVF because possession of firearm is not by itself illegal, thus “serious violent felon” is probative and essential to defendant’s guilt); *see also Imel v. State*, 830 N.E.2d 913, 919 (Ind. Ct. App. 2005), *trans. denied* (appellate counsel was not ineffective for failing to challenge State and trial court’s reference to defendant as “serious violent felon,” because defendant failed to show that it would change the outcome at trial).

3. Closing Argument

Gaddie also argues ineffective assistance of trial counsel for failure to object to prosecutorial misconduct because he claims the State, during closing argument, misstated facts, assumed facts not in evidence, and overall “conducted himself in a thoroughly indecorous and improper manner.” *Appellant’s Br.* at 28. Gaddie failed to reference any particular instance of misconduct in his amended petition for post-conviction relief and, therefore, has waived this issue. *See Johnson v. State*, 832 N.E.2d 985, 996 (Ind. Ct. App. 2005), *trans. denied*. (issues not raised in petition for post-conviction relief are waived).

E. Failure to Object to Trial Court’s Rulings

Next, Gaddie claims that his trial counsel was ineffective for failing to object to several rulings by the trial court. We, again, begin our review with the presumption that counsel’s performance was adequate and that defendant was not prejudiced by counsel’s performance. Here, we must first determine that the trial court would have sustained any objection if counsel made it. *See Law v. State*, 797 N.E.2d 1157, 1164 (Ind. Ct. App.

2003), (citing *Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind. 2001)).

1. Criminal Rule 4(B)

Petitioner claims that he was denied his Indiana Criminal Rule 4(B) right to a speedy trial by his counsel's continuance. The rule provides for discharge of a defendant who is not brought to trial within seventy (70) days of filing a motion for early trial. Ind. Crim. Rule 4(B). Gaddie was charged on August 30, 2001, moved for an early trial on August 31, 2001, and had trial on November 1, 2001. Thus, the trial was held within the 70-day period after Gaddie filed his motion, and he received his constitutionally protected right to a speedy trial.

2. Failure to Produce Witness at 404(B) Hearing

Gaddie also asserts that his trial counsel was ineffective because he did not object to the State's failure to call a witness in support of its motion to use Gaddie's prior bad acts pursuant to Indiana Evidence Rule 404(B). Specifically, the State intended to use Taylor's statement to the police that she had observed Gaddie with the firearms a day prior to his arrest.² At trial, Taylor denied ever saying that Gaddie possessed the firearms, and as a result, the State intended to use her previous statement regarding Gaddie's prior bad acts to impeach her under Indiana Evidence Rules 607 and 613. Further, the Indiana Rules of Evidence do not require the State to present a witness in support of a 404(B) motion only to provide "reasonable notice . . . of the general nature of any such evidence." Gaddie was not denied ineffective assistance of trial counsel.

² A serious question may be raised whether such evidence is subject to Indiana Evidence Rule 404(B). Gaddie's possession of the firearms on the day prior to the day on which he was charged may well be deemed direct evidence of the crime with which he was charged and not evidence of other crimes, wrongs, or acts.

3. Trial Conduct

Gaddie lastly complains that his trial counsel was ineffective for failing to object to the trial court's rulings on its: (1) control of a trial spectator; (2) admonishment of witness Taylor that she was under subpoena and required to appear; (3) control of a jury note; and (4) comment during a sidebar of Phillip's intent to take the 5th Amendment privilege against self-incrimination. However, Gaddie, again, fails to show how any of the above alleged errors caused him prejudice. *See Thompson*, 793 N.E.2d at 1051.

II. Appellate Counsel

Our review of ineffective assistance of appellate counsel is the same as outlined for trial counsel. *Id.* (citing *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998)). “[A] petitioner must first demonstrate that his counsel’s representation fell below professional norms.” *Id.* “Then, the petitioner must demonstrate that his counsel’s errors resulted in prejudice.” *Id.* Again, we must start with the presumption that counsel’s performance was adequate, and we may dismiss an ineffective assistance claim based upon the prejudice prong, without addressing whether counsel’s performance was deficient. *Id.*

Gaddie claims that his appellate counsel was ineffective for failing to raise the issues discussed above on his direct appeal. However, as discussed above, Gaddie has failed to establish the prejudice prong of *Strickland* on each of such issues. *See Timberlake*, 753 N.E.2d at 603 (citing *Strickland*, 466 U.S. at 687-88, 694).

The remaining issue is whether Gaddie’s appellate counsel was ineffective for failing to challenge the aggravators used to enhance his sentence. Gaddie claims that his

appellate counsel failed to challenge the trial court's use of his criminal history as an aggravator because the trial court "failed to refer to any circumstances within his criminal history which are similar to firearm possession." *Appellant's Br.* at 37.

During Gaddie's sentencing hearing, the trial court referenced Gaddie's criminal history as an aggravator. Gaddie's criminal history, beyond his 1985 voluntary manslaughter conviction, included convictions for three auto thefts, burglary, attempted burglary, driving while suspended, operating a vehicle while intoxicated, and possession of cocaine. *Appellant's Direct Appeal App.* at 82-86. This criminal history exclusive of his voluntary manslaughter conviction was sufficient to enhance his sentence. *See Hatchett v. State*, 740 N.E.2d 920, 929 (Ind. Ct. App. 2000), *trans. denied* (improper use of predicate offense does not automatically render original sentence unsustainable because extensive criminal history supported enhanced sentence). There is no requirement that the trial court refer to circumstances within the defendant's criminal history that are similar to defendant's present conviction. Appellate counsel would not have been successful on such issue and was not ineffective for failing to raise it.

III. Subpoena Witnesses

Lastly, Gaddie claims the post-conviction court abused its discretion in denying his request to subpoena several witnesses. In addition, Gaddie asserts that the post-conviction court failed to enter findings as to why it refused his requests.

A post-conviction court has the discretion to grant or deny a petitioner's request for a subpoena. *Johnson*, 832 N.E.2d at 994 (citing *Allen v. State*, 791 N.E.2d 748, 756 (Ind. Ct. App. 2003), *trans denied*). An abuse of discretion occurs when the court's

decision is against the logic and effect of the facts and circumstances before the court. *Id.*

Indiana Post Conviction Rule 1(9)(b) provides, “If the pro se petitioner requests issuance of subpoenas for witnesses at an evidentiary hearing, the petitioner shall specifically state by affidavit the reason the witness’ testimony is required and the substance of the witness’ expected testimony.”

Here, Gaddie failed to specifically state the reason why any of the requested witness’s testimony was required or what the substance of such testimony would be. Instead, Gaddie merely stated that each witness would testify to facts that led to Gaddie’s arrest and conviction, and facts regarding issues raised in Gaddie’s post-conviction petition. Thus, Gaddie failed to set out the substance of the testimony and why it was required, and the trial court did not abuse its discretion in denying Gaddie’s requested subpoenas.

Affirmed.

ROBB, J., and BARNES, J., concur.